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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-1043 (Sub-No. 1)

**MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
DISCONTINUANCE OF SERVICE AND ABANDONMENT
IN AROOSTOCK AND PENOBSCOT COUNTIES, MAINE**

**REPLY OF MONTREAL, MAINE & ATLANTIC
RAILWAY, LTD. TO PETITION TO CLASSIFY THE
SCOPE OF THE BOARD'S ENVIRONMENTAL REVIEW**

James E. Howard
1 Thompson Square
Suite 201
Charlestown, MA 02129
617.886.9322
jim@jehowardlaw.com

Linda J. Morgan
Charles H.P. Vance
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
202.662.5214
lmorgan@cov.com
cvance@cov.com

Counsel for Montreal, Maine & Atlantic Railway, Ltd.

Dated: April 7, 2010

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INTRODUCTION

Montréal, Maine & Atlantic Railway, Ltd. ("MMA") hereby replies to the Petition to Classify the Scope of the Board's Environmental Review ("Petition") filed by Irving Woodlands LLC; Irving Forest Products, Inc.; Louisiana-Pacific Corp.; and Huber Engineered Woods, LLC (collectively, "Petitioners") on March 18, 2010, in STB Docket No. AB-1043 (Sub-No. 1). MMA urges the Surface Transportation Board ("Board") to deny the Petition. Abandonments and discontinuances of service such as the one at issue in this case typically involve the preparation of an Environmental Assessment ("EA") rather than a full Environmental Impact Statement ("EIS") because they are actions that may, but generally do not, have significant environmental effects. The Board's approach in this regard is eminently reasonable given that preparation of an EA is a process specifically designed to answer the question of whether an EIS

should subsequently be prepared. Petitioners' attempt to leapfrog the Board's implementation of its normal procedures and institute full EIS review as a threshold matter is both inappropriate and unnecessary. Every one of the specific environmental issues Petitioners seek to raise can be adequately considered in the context of an EA. Petitioners fail to explain why they believe an EIS is the only vehicle that can adequately take into account the specific factors about which they express concern, and cite no caselaw to support their contention that preparation of an EA is somehow inadequate given the circumstances of this case. As a result, the Petition should be denied.

ARGUMENT

A. The Board Is Proceeding Appropriately In This Case.

As Petitioners acknowledge, 49 C.F.R. § 1105.6(b) specifies that the Board's usual process is to prepare an EA in the context of applications seeking to abandon a rail line or discontinue freight service. *See* Petition at 3 ("The regulations provide that an EA will 'normally' be prepared for proposed abandonment or discontinuance actions."). The Board does not require the initial preparation of a full EIS in the context of abandonments and discontinuances of service because "[u]nder both the President's Council on Environmental Quality and [the Board's] own environmental rules, actions are separated into classes that prescribe the level of documentation required in the NEPA process depending on the likelihood of significant environmental effects. Actions that **generally have significant effects** on the environment require the preparation of a full Environmental Impact Statement. On the other hand, actions that **may have a significant impact** ordinarily require the preparation of a more limited EA." *Norfolk Southern Railway Co., Pan Am Railways, Inc., et al.—Joint Control & Operating/Pooling Agreements—Pan Am Southern LLC*, STB Fin. Docket No. 35147, slip op. at

2 (STB served Sept. 25, 2008) (emphasis added). Because abandonments and discontinuances of service “may have a significant impact” on the environment, but “generally” do not, the Board has rendered a clear policy directive that such actions require “the preparation of a more limited EA” in the first instance. Petitioners’ attempt to leapfrog the Board’s implementation of its normal procedures and institute full EIS review as a threshold matter would undermine this policy decision and is therefore inappropriate.

The Board’s approach to environmental review in the context of abandonments and discontinuances of service is eminently reasonable. Despite Petitioners’ suggestion that the more limited EA somehow gives short shrift to important environmental issues,¹ the preparation of an EA plays an important role in the environmental review process. Here, as in other abandonment and discontinuance of service proceedings, the Board’s Section on Environmental Analysis (“SEA”) has developed a Preliminary Draft Environmental Assessment (“PDEA”) and has circulated that document to (among others) the appropriate federal, state, regional, and local agencies pursuant to the Board’s environmental regulations at 49 C.F.R. § 1105.7(b). Once the SEA has duly considered any initial comments regarding the PDEA submitted by these entities,² it will issue a Draft Environmental Assessment (“Draft EA”). Other interested parties and

¹ It should go without saying that the Board’s universal practice of independently verifying and investigating the information contained in the environmental and historic reports provided to the Board by the applicant (or the relevant third-party consultant) is not limited to the EIS context. *See, e.g., Consolidated Rail Corp.—Abandonment Exemption—In Hudson County, NJ*, STB Docket No. AB-167 (Sub-No. 1189X), slip op. at 3-4 (STB served Mar. 23, 2009) (explaining the Board’s verification and investigation obligations in a case where the Board rejected suggestions that the proposed abandonment was controversial and therefore warranted preparation of an EIS).

² Certain parties have already submitted comments to the Board regarding the PDEA in this case. *See Reply of State of Maine, Department of Transportation to Petition to Classify the Scope of the Board’s Environmental Review*, STB Docket No. AB-1043 (Sub-No. 1) (filed Mar. 29, 2010).

members of the general public will then be provided an opportunity to review and submit comments on the Draft EA, which are then considered by the SEA and addressed in a Final Environmental Assessment ("Final EA").

It is therefore clear that the larger EA process (including, as it does, the preparation of a PDEA and a Draft EA) serves to clarify the relevant environmental issues, functions as a springboard for further discussion and, at bottom, seeks to determine whether any additional environmental review is warranted. Indeed, pursuant to the Council on Environmental Quality's general guidelines governing federal agency NEPA compliance, **preparation of an EA is a process specifically designed to answer the question of whether an EIS should subsequently be prepared.** See 40 C.F.R. § 1501.4(c) ("Based on the [results of the] environmental assessment," an agency is to "make its determination whether to prepare an environmental impact statement"); see also, e.g., *Norfolk Southern Railway Co., Pan Am Railways, Inc., et al.—Joint Control & Operating/Pooling Agreements—Pan Am Southern LLC*, STB Fin. Docket No. 35147, Post Environmental Assessment at S-2 (STB served Jan. 30, 2009) ("An EA is a document containing environmental analysis sufficient for the Board to determine whether it should prepare an EIS or make a finding that the transaction will have no significant environmental impact.").

In their effort to circumvent the Board's typical environmental review procedures governing abandonments and discontinuances of service, Petitioners cite to a single 1986 Interstate Commerce Commission ("ICC") decision for the proposition that the "the Board can and has utilized an EIS in appropriate circumstances." Petition at 3 (citing *The Baltimore & Ohio Railroad Co. & Washington & Western Maryland Railway Co.—Abandonment and Discontinuance of Service—In Montgomery County, MD, and the District of Columbia*, ICC

Docket No. AB-19 (Sub-No. 112) (ICC corrected decision served May 27, 1986)). What Petitioners neglect to mention, however, is that an EIS was only prepared in that case after the ICC-prepared EA concluded “that abandonment may result in significant effects on the human environment, including historical and archaeological resources; that information for a satisfactory evaluation was incomplete and inconclusive; and that an EIS was [therefore] required and recommended.” Notice of Intent to Prepare an Environmental Impact Statement and to Hold a Public Scoping Meeting, *Baltimore & Ohio Railroad Co., et al.; Abandonment of the Georgetown Subdivision Rail Line Between Montgomery County, MD and Georgetown, District of Columbia*, ICC Docket No. AB-19 (Sub-112), 51 Fed. Reg. 20,558-02, 20,559 (June 5, 1986). The *Baltimore & Ohio* case stands for nothing more than the wholly unremarkable proposition that a full EIS should be prepared if the Board completes the first step in the environmental review process (preparation of an EA) and concludes that the proposed abandonment or discontinuance of service is likely to have a significant environmental impact. It certainly provides no support for Petitioners’ argument that the Board’s typical environmental review procedures should be short-circuited in this case, or that the EA process somehow does not sufficiently take into account important environmental concerns.

B. The Petitioners Fail To Justify Their Argument That The Board’s Usual Process Of Preparing An Environmental Assessment Should Be Disregarded.

Of course, the Board appropriately reserves to itself the authority to “reclassify or modify [the environmental] requirements for individual proceedings.” 49 C.F.R. § 1105.6(d). Thus, “[f]or actions generally requiring an EA, the Board may prepare a full EIS where the probability of significant impacts from the particular proposal is high enough to warrant an EIS.” 49 C.F.R. § 1105.6(d). Petitioners have presented no adequate justification for doing so here.

As an initial matter, every one of the specific environmental issues raised by Petitioners can be adequately considered in the context of an EA, and such issues are more appropriately reserved for the submission of comments after the SEA has issued the Draft EA.³ Petitioners fail to explain why they believe an EIS is the only vehicle that can adequately take into account the specific environmental factors about which they express concern, and cite no caselaw to support their contention that preparation of an EA is somehow inadequate given the circumstances of this case.

Petitioners first claim this case involves “significant rail volumes, customers, and regional transportation impacts,” presumably relative to other abandonment and discontinuance of service proceedings. Petition at 2. However, even assuming the accuracy of this statement *arguendo*, Petitioners fail to cite a single case suggesting that the presence of such factors alone justifies the preparation of an EIS.⁴

Petitioners also suggest that “the need to carefully evaluate the socio-economic and cumulative effects of the proposed abandonment” and discontinuance of service support preparation of an EIS. Petition at 5. Again, Petitioners cite no caselaw to support this argument. In fact, while the Board is required to “consider whether the abandonment or discontinuance will

³ The SEA is in the midst of preparing a Draft EA, which will presumably address the environmental issues raised by Petitioners and upon which all interested parties and members of the general public will have an opportunity to comment. MMA will provide whatever response on these issues is appropriate at that time.

⁴ Indeed, EAs have been prepared in abandonment and discontinuance of service cases involving lengths of track and diverted traffic volumes roughly similar to those at issue in this case. *See, e.g., CSX Transportation, Inc.—Abandonment—In Barbour, Randolph, Pocahontas, and Webster Counties, WV*, ICC Docket No. AB-55 (Sub-No. 500) (ICC served Mar. 13, 1995) (EA conducted in abandonment proceeding involving 123 miles of track); *The Cincinnati, New Orleans, and Texas Pacific Railway Co.—Abandonment Exemption—In Roane County, TN*, STB Docket No. AB-290 (Sub-No. 236X) (STB served Oct. 14, 2005) (EA conducted in abandonment proceeding involving rail diversion analysis estimating more than 36,000 additional annual truck trips).

have a serious, adverse impact on rural or community development,” 49 U.S.C. § 10903(d), the statute directs that this consideration is to be considered in the context of the ultimate merits question of whether “the present or future public convenience and necessity require or permit the abandonment or discontinuance” of service, *id.* Contrary to Petitioners’ argument, such economic considerations have no direct relevance to the underlying question of which environmental review process should be utilized in the first instance, and will be appropriately considered in the context of the Board’s ultimate decision on the merits of the underlying abandonment and discontinuance of service application in this case (regardless of whether an EA or an EIS is prepared).

Petitioners further argue that “the need to carefully evaluate the core environmental impacts of the proposed abandonment” and discontinuance of service supports preparation of an EIS. Petition at 8. However, Petitioners fail to explain why consideration of such “core environmental impacts” in the context of an EA would be insufficient. Indeed, Petitioners’ greater aim is to suggest that only an EIS can provide the “thoughtful and appropriate environmental review” that is necessary, Petition at 2, while never explaining why they believe this to be true in this case.

Finally, Petitioners claim that MMA’s proposed abandonment and discontinuance of service is a “highly controversial” action that would be “precedent-setting,” factors they claim justify the preparation of an EIS. Petition at 15-16. Again, even assuming *arguendo* the accuracy of this characterization, Petitioners fail to cite a single case suggesting that the controversial or precedent-setting nature of a proposed abandonment and discontinuance of service, by itself, justifies preparation of an EIS. The two cases Petitioners cite in support of this argument are construction cases, not abandonment cases. *See Southwest Gulf Railroad Co.—*

Construction and Operation Exemption—Medina County, TX, STB Fin. Docket No. 34284 (STB served Jan. 28, 2004) (preparation of an EIS in the context of a 49 U.S.C. § 10502 petition for authority to construct and operate a new rail line); *HolRail LLC—Construction and Operation Exemption—In Orangeburg and Dorchester Counties, South Carolina*, STB Fin. Docket No. 34421 (STB served July 21, 2005) (same). Again, EAs are “normally...prepared” for abandonments while EISs are “normally...prepared for rail construction proposals.” 49 C.F.R. § 1105.6(a)-(b). Moreover, whether a proposed action is “likely to be highly controversial” or “may establish a precedent for future actions” are but two of the many factors that are to be taken into consideration when determining whether the proposed action will result in “significant” environmental effects under the NEPA regulations. *See* 40 C.F.R. § 1508.27. Indeed, such a determination requires “consideration[] of both context and intensity.” *Id.*⁵ Again, even assuming for the sake of argument that the proposed abandonment and discontinuance of service would constitute a “highly controversial” or “precedent-setting” action, Petitioners fail to justify their argument that these two factors should be elevated in importance above the other factors specified in the NEPA regulations. In fact, every factor relevant to considerations of both “context” and “intensity” should be taken into account, and the proper vehicle for such an accounting is the preparation of an EA.

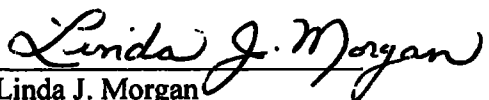
⁵ The controversial or precedent-setting nature of a proposed action are two of the ten environmental factors to be considered under the general rubric of “intensity” (i.e., the severity of the proposed action’s impact). *See* 40 C.F.R. § 1508.27(b). Considerations of “context” must also be brought to bear when evaluating the potential environmental significance of a proposed action. *See id.* § 1508.27(a).

CONCLUSION

For the reasons stated above, the Board should deny the Petition.

Respectfully submitted,

James E. Howard
1 Thompson Square
Suite 201
Charlestown, MA 02129
617.886.9322
jim@jehowardlaw.com


Linda J. Morgan
Charles H.P. Vance
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
202.662.5214
lmorgan@cov.com
cvance@cov.com

Counsel for Montréal, Maine & Atlantic Railway, Ltd.

Dated: April 7, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I served a copy of the foregoing Reply of
Montréal, Maine & Atlantic Railway, Ltd. to the Petition to Classify the Scope of the Board's
Environmental Review on the following by email or U.S. mail, postage prepaid:

Karyn A. Booth
Jeff Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, NW
Suite 800
Washington, DC 20036

Donald G. Avery
Peter A. Pfohl
Slover & Loftus
1224 17th Street, NW
Washington, DC 20036

Scott G. Knudson
Briggs and Morgan, PA
2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402

Toni Kemmerle
Chief Counsel
State of Maine, Department of Transportation
16 State House Station
Augusta, ME 04333-0016

Eric Hocky
Thorp Reed & Armstrong, LLP
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103

Arkon Horne
Fraser Papers
P.O. Box 749
Ashland, ME 04732

John Cashwell
Portage Wood Products, LLC
P.O. Box 156
Portage, ME 04768

Hon. Susan M. Collins
United States Senate
413 Dirksen Senate Office Building
Washington, DC 20510

Hon. Olympia J. Snowe
United States Senate
154 Russell Senate Office Building
Washington, DC 20510

Hon. Michael H. Michaud
United States House of Representatives
Washington, DC 20515

Hon. James L. Oberstar
United States House of Representatives
Washington, DC 20515

A handwritten signature in black ink, appearing to read 'C.H.P. Vance', written over a horizontal line.

Charles H.P. Vance

Dated: April 7, 2010